

112TH CONGRESS
1ST SESSION

S. 1606

To reform the process by which Federal agencies analyze and formulate new regulations and guidance documents.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 22, 2011

Mr. PORTMAN (for himself, Mr. PRYOR, and Ms. COLLINS) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

To reform the process by which Federal agencies analyze and formulate new regulations and guidance documents.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Regulatory Account-
5 ability Act of 2011”.

6 **SEC. 2. DEFINITIONS.**

7 Section 551 of title 5, United States Code, is amend-
8 ed—

9 (1) in paragraph (13), by striking “and” at the
10 end;

1 (2) in paragraph (14), by striking the period at
2 the end and inserting a semicolon; and

3 (3) by adding at the end the following:

4 “(15) ‘guidance’ means an agency statement of
5 general applicability and future effect, other than a
6 regulatory action, that sets forth a policy on a statu-
7 tory, regulatory or technical issue or an interpreta-
8 tion of a statutory or regulatory issue;

9 “(16) ‘high-impact rule’ means any rule that
10 the Administrator of the Office of Information and
11 Regulatory Affairs determines is likely to impose an
12 annual cost on the economy of \$1,000,000,000 or
13 more, adjusted annually for inflation;

14 “(17) ‘Information Quality Act’ means section
15 515 of Public Law 106–554, the Treasury and Gen-
16 eral Government Appropriations Act for Fiscal Year
17 2001, and guidelines issued by the Administrator of
18 the Office of Information and Regulatory Affairs or
19 other agencies under that Act;

20 “(18) ‘major guidance’ means guidance that the
21 Administrator of the Office of Information and Reg-
22 ulatory Affairs finds is likely to lead to—

23 “(A) an annual cost on the economy of
24 \$100,000,000 or more, adjusted annually for
25 inflation;

1 “(B) a major increase in costs or prices for
2 consumers, individual industries, Federal,
3 State, local or tribal government agencies, or
4 geographic regions; or

5 “(C) significant adverse effects on competi-
6 tion, employment, investment, productivity, in-
7 novation, or on the ability of United States-
8 based enterprises to compete with foreign-based
9 enterprises in domestic and export markets;

10 “(19) ‘major rule’ means any rule that the Ad-
11 ministrator of the Office of Information and Regu-
12 latory Affairs determines is likely to impose—

13 “(A) an annual cost on the economy of
14 \$100,000,000 or more, adjusted annually for
15 inflation;

16 “(B) a major increase in costs or prices for
17 consumers, individual industries, Federal,
18 State, local, or tribal government agencies, or
19 geographic regions; or

20 “(C) significant adverse effects on competi-
21 tion, employment, investment, productivity, in-
22 novation, or on the ability of United States-
23 based enterprises to compete with foreign-based
24 enterprises in domestic and export markets; and

1 “(20) ‘Office of Information and Regulatory Af-
2 fairs’ means the office established under section
3 3503 of chapter 35 of title 44 and any successor to
4 that office.”.

5 **SEC. 3. RULEMAKING.**

6 (a) Section 553(a) of title 5, United States Code, is
7 amended by striking “(a) This section applies” and insert-
8 ing “(a) APPLICABILITY.—This section applies”.

9 (b) Section 553 of title 5, United States Code, is
10 amended by striking subsections (b) through (e) and in-
11 serting the following:

12 “(b) RULE MAKING CONSIDERATIONS.—In a rule
13 making, an agency shall make all preliminary and final
14 determinations based on evidence and consider, in addition
15 to other applicable considerations, the following:

16 “(1) The legal authority under which a rule
17 may be proposed, including whether a rule making
18 is required by statute, and if so, whether by a spe-
19 cific date, or whether the agency has discretion to
20 commence a rule making.

21 “(2) Other statutory considerations applicable
22 to whether the agency can or should propose a rule
23 or undertake other agency action.

24 “(3) The specific nature and significance of the
25 problem the agency may address with a rule (includ-

1 ing the degree and nature of risks the problem poses
2 and the priority of addressing those risks compared
3 to other matters or activities within the jurisdiction
4 of the agency), whether the problem warrants new
5 agency action, and the countervailing risks that may
6 be posed by alternatives for new agency action.

7 “(4) Whether existing rules have created or
8 contributed to the problem the agency may address
9 with a rule and whether those rules could be amend-
10 ed or rescinded to address the problem in whole or
11 part.

12 “(5) Any reasonable alternatives for a new rule
13 or other response identified by the agency or inter-
14 ested persons, including not only responses that
15 mandate particular conduct or manners of compli-
16 ance, but also—

17 “(A) the alternative of no Federal re-
18 sponse;

19 “(B) amending or rescinding existing
20 rules;

21 “(C) potential regional, State, local, or
22 tribal regulatory action or other responses that
23 could be taken instead of agency action; and

24 “(D) potential responses that—

1 “(i) specify performance objectives
2 rather than conduct or manners of compli-
3 ance;

4 “(ii) establish economic incentives to
5 encourage desired behavior;

6 “(iii) provide information upon which
7 choices can be made by the public; or

8 “(iv) incorporate other innovative al-
9 ternatives rather than agency actions that
10 specify conduct or manners of compliance.

11 “(6) Notwithstanding any other provision of
12 law—

13 “(A) the potential costs and benefits asso-
14 ciated with potential alternative rules and other
15 responses considered under paragraph (5), in-
16 cluding direct, indirect, and cumulative costs
17 and benefits and estimated impacts on jobs,
18 economic growth, innovation, and economic
19 competitiveness;

20 “(B) the means to increase the cost-effec-
21 tiveness of any Federal response; and

22 “(C) incentives for innovation, consistency,
23 predictability, lower costs of enforcement and
24 compliance (to government entities, regulated
25 entities, and the public), and flexibility.

1 “(c) ADVANCE NOTICE OF PROPOSED RULE MAKING
2 FOR MAJOR RULES AND HIGH-IMPACT RULES.—

3 “(1) In the case of a rule making for a major
4 rule or high-impact rule, not later than 90 days be-
5 fore a notice of proposed rule making is published
6 in the Federal Register, an agency shall publish ad-
7 vance notice of proposed rule making in the Federal
8 Register.

9 “(2) In publishing advance notice under para-
10 graph (1), the agency shall—

11 “(A) include a written statement identi-
12 fying, at a minimum—

13 “(i) the nature and significance of the
14 problem the agency may address with a
15 rule, including data and other evidence and
16 information on which the agency expects to
17 rely for the proposed rule;

18 “(ii) the legal authority under which a
19 rule may be proposed, including whether a
20 rule making is required by statute, and if
21 so, whether by a specific date, or whether
22 the agency has discretion to commence a
23 rule making; and

1 “(iii) preliminary information avail-
2 able to the agency concerning the other
3 considerations specified in subsection (b);

4 “(B) solicit written data, views or argu-
5 ments from interested persons concerning the
6 information and issues addressed in the ad-
7 vance notice; and

8 “(C) provide for a period of not fewer than
9 60 days for interested persons to submit such
10 written data, views, or arguments to the agen-
11 cy.

12 “(d) NOTICES OF PROPOSED RULE MAKING; DETER-
13 MINATIONS OF OTHER AGENCY COURSE.—Following com-
14 pletion of procedures under subsection (c), if applicable,
15 and consultation with the Administrator of the Office of
16 Information and Regulatory Affairs, the agency shall pub-
17 lish either a notice of proposed rule making or a deter-
18 mination of other agency course, in accordance with the
19 following:

20 “(1) A notice of proposed rule making shall in-
21 clude—

22 “(A) a statement of the time, place, and
23 nature of public rule making proceedings;

24 “(B) reference to the legal authority under
25 which the rule is proposed;

1 “(C) the terms of the proposed rule;

2 “(D) a description of information known to
3 the agency on the subject and issues of the pro-
4 posed rule, including—

5 “(i) a summary of information known
6 to the agency concerning the consider-
7 ations specified in subsection (b);

8 “(ii) a summary of additional infor-
9 mation the agency provided to and ob-
10 tained from interested persons under sub-
11 section (c); and

12 “(iii) information specifically identi-
13 fying all data, studies, models, and other
14 evidence or information considered or used
15 by the agency in connection with the deter-
16 mination by the agency to propose the
17 rule;

18 “(E)(i) a reasoned preliminary determina-
19 tion of need for the rule based on the informa-
20 tion described under subparagraph (D); and

21 “(ii) an additional statement of whether a
22 rule is required by statute;

23 “(F) a reasoned preliminary determination
24 that the benefits of the proposed rule meet the
25 relevant statutory objectives and justify the

1 costs of the proposed rule, including all costs to
2 be considered under subsection (b)(6), based on
3 the information described under subparagraph
4 (D);

5 “(G) a discussion of—

6 “(i) the alternatives to the proposed
7 rule, and other alternative responses, con-
8 sidered by the agency under subsection (b);

9 “(ii) the costs and benefits of those
10 alternatives, including all costs to be con-
11 sidered under subsection (b)(6);

12 “(iii) whether those alternatives meet
13 relevant statutory objectives; and

14 “(iv) why the agency did not propose
15 any of those alternatives; and

16 “(H)(i) a statement of whether existing
17 rules have created or contributed to the prob-
18 lem the agency seeks to address with the pro-
19 posed rule; and

20 “(ii) if so, whether or not the agency pro-
21 poses to amend or rescind any such rules, and
22 why.

23 All information considered by the agency, and ac-
24 tions to obtain information by the agency, in connec-
25 tion with its determination to propose the rule, in-

1 including all information described by the agency
2 under subparagraph (D) and, at the discretion of
3 the President or the Administrator of the Office of
4 Information and Regulatory Affairs, information
5 provided by that Office in consultations with the
6 agency, shall be placed in the docket for the pro-
7 posed rule and made accessible to the public for the
8 public's use when the notice of proposed rule making
9 is published.

10 “(2)(A) A notice of determination of other
11 agency course shall include a description of the al-
12 ternative response the agency determined to adopt.

13 “(B) If in its determination of other agency
14 course the agency makes a determination to amend
15 or rescind an existing rule, the agency need not un-
16 dertake additional proceedings under subsection (c)
17 before the agency publishes a notice of proposed rule
18 making to amend or rescind the existing rule.

19 All information considered by the agency, and ac-
20 tions to obtain information by the agency, in connec-
21 tion with its determination of other agency course,
22 including the information specified under paragraph
23 (1)(D) and, at the discretion of the President or the
24 Administrator of the Office of Information and Reg-
25 ulatory Affairs, information provided by that Office

1 in consultations with the agency, shall be placed in
2 the docket for the determination and made acces-
3 sible to the public for the public's use when the no-
4 tice of determination is published.

5 “(3) After notice of proposed rule making re-
6 quired by this section, the agency shall provide inter-
7 ested persons an opportunity to participate in the
8 rule making through submission of written data,
9 views, or arguments with or without opportunity for
10 oral presentation, except that—

11 “(A) if a hearing is required under para-
12 graph (4)(B) or subsection (e), reasonable op-
13 portunity for oral presentation shall be provided
14 under that requirement; or

15 “(B) when other than under subsection (e)
16 rules are required by statute or at the discre-
17 tion of the agency to be made on the record
18 after opportunity for an agency hearing, sec-
19 tions 556 and 557 shall apply, and paragraph
20 (4), requirements of subsection (e) to receive
21 comment outside of the procedures of sections
22 556 and 557, and the petition procedures of
23 subsection (e)(6) shall not apply.

24 The agency shall provide not fewer than 90 days for
25 interested persons to submit written data, views, or

1 arguments (or 120 days in the case of a proposed
2 major rule or high-impact rule).

3 “(4)(A) Within 30 days after publication of no-
4 tice of proposed rule making, a member of the public
5 may petition for a hearing in accordance with sec-
6 tion 556 to determine whether any evidence or other
7 information upon which the agency bases the pro-
8 posed rule fails to comply with of the Information
9 Quality Act.

10 “(B)(i) The agency may, upon review of the pe-
11 tition, determine without further process to exclude
12 from the rule making the evidence or other informa-
13 tion that is the subject of the petition and, if appro-
14 priate, withdraw the proposed rule. The agency shall
15 promptly publish any such determination.

16 “(ii) If the agency does not resolve the petition
17 under the procedures of clause (i), it shall grant any
18 such petition that presents a prima facie case that
19 evidence or other information upon which the agency
20 bases the proposed rule fails to comply with the In-
21 formation Quality Act, hold the requested hearing
22 not later than 30 days after receipt of the petition,
23 provide for a reasonable opportunity for cross-exam-
24 ination at the hearing, and decide the issues pre-
25 sented by the petition not later than 60 days after

1 receipt of the petition. The agency may deny any pe-
2 tition that it determines does not present such a
3 prima facie case.

4 “(C) There shall be no judicial review of the
5 agency’s disposition of issues considered and decided
6 or determined under subparagraph (B)(ii) until judi-
7 cial review of the agency’s final action. There shall
8 be no judicial review of an agency’s determination to
9 withdraw a proposed rule under subparagraph
10 (B)(i).

11 “(D) Failure to petition for a hearing under
12 this paragraph shall not preclude judicial review of
13 any claim based on the Information Quality Act
14 under chapter 7 of this title.

15 “(e) HEARINGS FOR HIGH-IMPACT RULES.—Fol-
16 lowing notice of a proposed rule making, receipt of com-
17 ments on the proposed rule, and any hearing held under
18 subsection (d)(4), and before adoption of any high-impact
19 rule, the agency shall hold a hearing in accordance with
20 sections 556 and 557, unless such hearing is waived by
21 all participants in the rule making other than the agency.
22 The agency shall provide a reasonable opportunity for
23 cross-examination at such hearing. The hearing shall be
24 limited to the following issues of fact, except that partici-

1 pants at the hearing other than the agency may waive de-
2 termination of any such issue:

3 “(1) Whether the agency’s asserted factual
4 predicate for the rule is supported by the evidence.

5 “(2) Whether there is an alternative to the pro-
6 posed rule that would achieve the relevant statutory
7 objectives at a lower cost (including all costs to be
8 considered under subsection (b)(6)) than the pro-
9 posed rule.

10 “(3) If there is more than one alternative to the
11 proposed rule that would achieve the relevant statu-
12 tory objectives at a lower cost than the proposed
13 rule, which alternative would achieve the relevant
14 statutory objectives at the lowest cost.

15 “(4) If the agency proposes to adopt a rule that
16 is more costly than the least costly alternative that
17 would achieve the relevant statutory objectives (in-
18 cluding all costs to be considered under subsection
19 (b)(6)), whether the additional benefits of the more
20 costly rule exceed the additional costs of the more
21 costly rule.

22 “(5) Whether the evidence and other informa-
23 tion upon which the agency bases the proposed rule
24 meets the requirements of the Information Quality
25 Act.

1 “(6) Upon petition by an interested person who
2 has participated in the rule making, other issues rel-
3 evant to the rule making, unless the agency deter-
4 mines that consideration of the issues at the hearing
5 would not advance consideration of the rule or
6 would, in light of the nature of the need for agency
7 action, unreasonably delay completion of the rule
8 making. An agency shall grant or deny a petition
9 under this paragraph within 30 days after the re-
10 ceipt of the petition.

11 No later than 45 days before any hearing held under
12 this subsection or sections 556 and 557, the agency
13 shall publish in the Federal Register a notice speci-
14 fying the proposed rule to be considered at such
15 hearing, the issues to be considered at the hearing,
16 and the time and place for such hearing, except that
17 such notice may be issued not later than 15 days be-
18 fore a hearing held under subsection (d)(4)(B).

19 “(f) FINAL RULES.—(1) The agency shall adopt a
20 rule only following consultation with the Administrator of
21 the Office of Information and Regulatory Affairs to facili-
22 tate compliance with applicable rule making requirements.

23 “(2) The agency shall adopt a rule only on the basis
24 of the best reasonably obtainable scientific, technical, eco-

1 nomic, and other evidence and information concerning the
2 need for and consequences of the rule.

3 “(3)(A) Except as provided in subparagraph (B), the
4 agency shall adopt the least costly rule considered during
5 the rule making (including all costs to be considered under
6 subsection (b)(6)) that meets relevant statutory objectives.

7 “(B) The agency may adopt a rule that is more costly
8 than the least costly alternative that would achieve the rel-
9 evant statutory objectives only if—

10 “(i) the additional benefits of the more costly
11 rule justify its additional costs; and

12 “(ii) the agency explains its reason for doing so
13 based on interests of public health, safety or welfare
14 (including protection of the environment) that are
15 clearly within the scope of the statutory provision
16 authorizing the rule.

17 “(4) When the agency adopts a final rule, the agency
18 shall publish a notice of final rule making. The notice shall
19 include—

20 “(A) a concise, general statement of the rule’s
21 basis and purpose;

22 “(B) the agency’s reasoned final determination
23 of need for a rule to address the problem the agency
24 seeks to address with the rule, including a statement
25 of whether a rule is required by statute.

1 “(C) the agency’s reasoned final determination
2 that the benefits of the rule meet the relevant statu-
3 tory objectives and justify the rule’s costs (including
4 all costs to be considered under subsection (b)(6));

5 “(D) the agency’s reasoned final determination
6 not to adopt any of the alternatives to the proposed
7 rule considered by the agency during the rule mak-
8 ing, including—

9 “(i) the agency’s reasoned final determina-
10 tion that no alternative considered achieved the
11 relevant statutory objectives with lower costs
12 (including costs to be considered under sub-
13 section (b)(6)) than the rule; or

14 “(ii) the agency’s reasoned final determina-
15 tion that its adoption of a more costly rule com-
16 plies with paragraph (3)(B);

17 “(E) the agency’s reasoned final determina-
18 tion—

19 “(i) that existing rules have not created or
20 contributed to the problem the agency seeks to
21 address with the rule; or

22 “(ii) that existing rules have created or
23 contributed to the problem the agency seeks to
24 address with the rule, and, if so—

1 “(I) why amendment or rescission of
2 such existing rules is not alone sufficient
3 to respond to the problem; and

4 “(II) whether and how the agency in-
5 tends to amend or rescind the existing rule
6 separate from adoption of the rule;

7 “(F) the agency’s reasoned final determination
8 that the evidence and other information upon which
9 the agency bases the rule complies with of the Infor-
10 mation Quality Act; and

11 “(G)(i) for any major rule or high-impact rule,
12 the agency’s plan for review of the rule no less fre-
13 quently than every ten years to determine whether,
14 based upon evidence, there remains a need for the
15 rule, whether the rule is in fact achieving statutory
16 objectives, whether the rule’s benefits continue to
17 justify its costs, and whether the rule can be modi-
18 fied or rescinded to reduce costs while continuing to
19 achieve statutory objectives.

20 “(ii) review of a rule under a plan required by
21 clause (i) of this subparagraph shall take into ac-
22 count the factors and criteria set forth in sub-
23 sections (b) through (e) and this subsection.

24 All information considered by the agency in connec-
25 tion with its adoption of the rule, and, at the discre-

1 tion of the President or the Administrator of the Of-
2 fice of Information and Regulatory Affairs, informa-
3 tion provided by that Office in consultations with the
4 agency, shall be placed in the docket for the rule and
5 made accessible to the public for the public's use not
6 later than the date on which the rule is adopted.

7 “(g) EXCEPTIONS FROM NOTICE AND HEARING RE-
8 QUIREMENTS.—(1) Except when notice or hearing is re-
9 quired by statute, subsections (c) through (e) of this sec-
10 tion do not apply to interpretive rules, general statements
11 of policy, or rules of agency organization, procedure, or
12 practice.

13 “(2)(A) When the agency for good cause, based upon
14 evidence, finds (and incorporates the finding and a brief
15 statement of reasons therefor in the rules issued) that
16 compliance with subsection (c), (d), or (e) or requirements
17 to render final determinations under subsection (f) of this
18 section before the issuance of an interim rule is impracti-
19 cable or contrary to the public interest, including interests
20 of national security, such subsections or requirements to
21 render final determinations shall not apply to the agency's
22 adoption of an interim rule.

23 “(B) If, following compliance with subparagraph (A)
24 of this paragraph, the agency adopts an interim rule, it
25 shall commence proceedings that comply fully with sub-

1 sections (c) through (f) of this section immediately upon
2 publication of the interim rule. No less than 270 days
3 from publication of the interim rule (or 18 months in the
4 case of a major rule or high-impact rule), the agency shall
5 complete rule making under subsections (c) through (f)
6 of this subsection and take final action to adopt a final
7 rule or rescind the interim rule. If the agency fails to take
8 timely final action, the interim rule shall cease to have
9 the effect of law.

10 “(C) Other than in cases involving interests of na-
11 tional security, upon the agency’s publication of an interim
12 rule without compliance with subsections (c), (d), or (e)
13 or requirements to render final determinations under sub-
14 section (f) of this section, an interested party may seek
15 immediate judicial review under chapter 7 of this title of
16 the agency’s determination to adopt such interim rule. The
17 record on such review shall include all documents and in-
18 formation considered by the agency and any additional in-
19 formation presented by a party that the court determines
20 necessary to consider to assure justice.

21 “(h) ADDITIONAL REQUIREMENTS FOR HEARINGS.—
22 When a hearing is required under subsection (e) or is oth-
23 erwise required by statute or at the agency’s discretion
24 before adoption of a rule, the agency shall comply with
25 the requirements of sections 556 and 557 in addition to

1 the requirements of subsection (f) in adopting the rule and
2 in providing notice of the rule's adoption.

3 “(i) DATE OF PUBLICATION OF RULE.—The required
4 publication or service of a substantive final or interim rule
5 shall be made not less than 30 days before the effective
6 date of the rule, except—

7 “(1) a substantive rule which grants or recog-
8 nizes an exemption or relieves a restriction;

9 “(2) interpretive rules and statements of policy;
10 or

11 “(3) as otherwise provided by the agency for
12 good cause found and published with the rule.

13 “(j) RIGHT TO PETITION.—Each agency shall give
14 an interested person the right to petition for the issuance,
15 amendment, or repeal of a rule.

16 “(k) RULE MAKING GUIDELINES.—(1)(A) The Ad-
17 ministrator of the Office of Information and Regulatory
18 Affairs shall have authority to establish guidelines for the
19 assessment, including quantitative and qualitative assess-
20 ment, of the costs and benefits of potential, proposed, and
21 final rules and other economic issues or issues related to
22 risk that are relevant to rule making under this section
23 and other sections of this title. The rigor of cost-benefit
24 analysis required by such guidelines shall be commensu-

1 rate, in the Administrator’s determination, with the eco-
2 nomic impact of the rule.

3 “(B) To ensure that agencies use the best available
4 techniques to quantify and evaluate anticipated present
5 and future benefits, costs, other economic issues, and risks
6 as accurately as possible, the Administrator of the Office
7 of Information and Regulatory Affairs shall regularly up-
8 date guidelines established under subparagraph (A).

9 “(2) The Administrator of the Office of Information
10 and Regulatory Affairs shall also have authority to issue
11 guidelines to promote coordination, simplification and har-
12 monization of agency rules during the rule making process
13 and otherwise. Such guidelines shall assure that each
14 agency avoids regulations that are inconsistent or incom-
15 patible with, or duplicative of, its other regulations and
16 those of other Federal agencies and drafts its regulations
17 to be simple and easy to understand, with the goal of mini-
18 mizing the potential for uncertainty and litigation arising
19 from such uncertainty.

20 “(3)(A) To ensure consistency in Federal rule mak-
21 ing, the Administrator of the Office of Information and
22 Regulatory Affairs shall—

23 “(i) issue guidelines and otherwise take action
24 to ensure that rule makings conducted in whole or
25 in part under procedures specified in provisions of

1 law other than those under this subchapter conform
2 to the fullest extent allowed by law with the proce-
3 dures set forth in this section; and

4 “(ii) issue guidelines for the conduct of hear-
5 ings under subsections (d)(4) and (e), including to
6 assure a reasonable opportunity for cross-examina-
7 tion.

8 “(B) Each agency shall adopt regulations for the con-
9 duct of hearings consistent with the guidelines issued
10 under this subparagraph.

11 “(4) The Administrator of the Office of Information
12 and Regulatory Affairs shall issue guidelines under the In-
13 formation Quality Act to apply in rule making proceedings
14 under this section and sections 556 and 557. In all cases,
15 the guidelines, and the Administrator’s specific determina-
16 tions regarding agency compliance with the guidelines,
17 shall be entitled to judicial deference.

18 “(l) RECORD.—The agency shall include in the record
19 for a rule making all documents and information consid-
20 ered by the agency during the proceeding, including, at
21 the discretion of the President or the Administrator of the
22 Office of Information and Regulatory Affairs, documents
23 and information communicated by that Office during con-
24 sultation with the agency.

1 “(m) EXEMPTION FOR MONETARY POLICY.—Noth-
 2 ing in subsections (b)(6), (d)(1) (F) through (G), (e), or
 3 (f)(3) or (4) (C) through (D) shall apply to rule makings
 4 that concern monetary policy proposed or implemented by
 5 the Board of Governors of the Federal Reserve System
 6 or the Federal Open Market Committee.”.

7 **SEC. 4. AGENCY GUIDANCE; PROCEDURES TO ISSUE MAJOR**
 8 **GUIDANCE; PRESIDENTIAL AUTHORITY TO**
 9 **ISSUE GUIDELINES FOR ISSUANCE OF GUID-**
 10 **ANCE.**

11 (a) IN GENERAL.—Chapter 5 of title 5, United
 12 States Code, is amended by inserting after section 553 the
 13 following new section:

14 **“§ 553a. Agency guidance; procedures to issue major**
 15 **guidance; authority to issue guidelines**
 16 **for issuance of guidance**

17 “(a) Before issuing any major guidance, an agency
 18 shall—

19 “(1) make and document a reasoned determina-
 20 tion that—

21 “(A) assures that such guidance is under-
 22 standable and complies with relevant statutory
 23 objectives and regulatory provisions;

24 “(B) identifies the costs and benefits (in-
 25 cluding all costs to be considered during the

1 rule making under section 553(b) of this title)
2 of conduct conforming to such guidance and
3 assures that such benefits justify such costs;
4 and

5 “(C) describes alternatives to such guid-
6 ance and their costs and benefits (including all
7 costs to be considered during rule making
8 under section 553(b) of this title) and explains
9 why the agency rejected those alternatives; and
10 “(2) confer with the Administrator of the Office
11 of Information and Regulatory Affairs on the
12 issuance of such guidance to assure that the guid-
13 ance is reasonable, understandable, consistent with
14 relevant statutory and regulatory provisions and re-
15 quirements or practices of other agencies, does not
16 produce costs that are unjustified by the guidance’s
17 benefits, and is otherwise appropriate.

18 “(b) AGENCY GUIDANCE.—

19 “(1) is not legally binding and may not be re-
20 lied upon by an agency as legal grounds for agency
21 action;

22 “(2) shall state in a plain, prominent and per-
23 manent manner that it is not legally binding; and

1 “(3) shall, at the time it is issued or upon re-
2 quest, be made available by the issuing agency to in-
3 terested persons and the public.

4 “(c) The Administrator of the Office of Information
5 and Regulatory Affairs shall have authority to issue guide-
6 lines for use by the agencies in the issuance of major guid-
7 ance and other guidance. Such guidelines shall assure that
8 each agency avoids issuing guidance documents that are
9 inconsistent or incompatible with, or duplicative of, its
10 other regulations and those of other Federal agencies and
11 drafts its guidance documents to be simple and easy to
12 understand, with the goal of minimizing the potential for
13 uncertainty and litigation arising from such uncertainty.”.

14 (b) TECHNICAL AND CONFORMING AMENDMENT.—
15 The table of sections for chapter 5 of title 5, United States
16 Code, is amended by inserting after the item relating to
17 section 553 the following:

 “553a. Agency guidance; procedures to issue major guidance; presidential au-
 thority to issue guidelines for issuance of guidance.”.

18 **SEC. 5. HEARINGS; PRESIDING EMPLOYEES; POWERS AND**
19 **DUTIES; BURDEN OF PROOF; EVIDENCE;**
20 **RECORD AS BASIS OF DECISION.**

21 Section 556 of title 5, United States Code, is amend-
22 ed by striking subsection (e) and inserting the following:

23 “(e)(1) The transcript of testimony and exhibits, to-
24 gether with all papers and requests filed in the proceeding,

1 constitutes the exclusive record for decision in accordance
2 with section 557 and, on payment of lawfully prescribed
3 costs, shall be made available to the parties. When an
4 agency decision rests on official notice of a material fact
5 not appearing in the evidence in the record, a party is
6 entitled, on timely request, to an opportunity to show the
7 contrary.

8 “(2) Notwithstanding paragraph (1) of this sub-
9 section, in a proceeding held under this section under sec-
10 tion 553(d)(4) or 553(e), the record for decision shall in-
11 clude any information that is part of the record of pro-
12 ceedings under section 553.

13 “(f) When an agency conducts rule making under this
14 section and section 557 directly after concluding pro-
15 ceedings upon an advance notice of proposed rule making
16 under section 553(c), the matters to be considered and
17 determinations to be made shall include, among other rel-
18 evant matters and determinations, the matters and deter-
19 minations described in subsections (b) and (f) of section
20 553.

21 “(g)(1) Upon receipt of a petition for a hearing under
22 this section, the agency shall grant the petition in the case
23 of any major rule, unless the agency reasonably deter-
24 mines that a hearing would not advance consideration of
25 the rule or would, in light of the need for agency action,

1 unreasonably delay completion of the rule making. The
2 agency shall publish its decision to grant or deny the peti-
3 tion when it renders the decision, including an explanation
4 of the grounds for decision. The information contained in
5 the petition shall in all cases be included in the adminis-
6 trative record.

7 “(2) This subsection shall not apply to rule makings
8 that concern monetary policy proposed or implemented by
9 the Board of Governors of the Federal Reserve System
10 or the Federal Open Market Committee.”.

11 **SEC. 6. ACTIONS REVIEWABLE.**

12 Section 704 of title 5, United States Code, is amend-
13 ed—

14 (1) by striking “Agency action made” and in-
15 serting “(a) Agency action made”; and

16 (2) by adding at the end the following:

17 “(b)(1) Except as provided under paragraph (2) and
18 notwithstanding subsection (a), upon the agency’s publica-
19 tion of an interim rule without compliance with section
20 553 (c), (d), or (e) or requirements to render final deter-
21 minations under subsection (f) of section 553, an inter-
22 ested party may seek immediate judicial review under this
23 chapter of the agency’s determination to adopt such rule
24 on an interim basis. Review shall be limited to whether
25 the agency abused its discretion to adopt the interim rule

1 without compliance with section 553 (c), (d), or (e) or
2 without rendering final determinations under subsection
3 (f) of section 553.

4 “(2) This subsection shall not apply in cases involving
5 interests of national security.

6 “(c) For rules other than major rules and high-im-
7 pact rules, compliance with sections 553(b)(6), (d)(1) (F)
8 through (G), and (f)(3) and (4) (C) through (D) shall not
9 be subject to judicial review. In all cases, the determina-
10 tion that a rule is not a major rule within the meaning
11 of section 551(19)(A) or a high-impact rule shall be sub-
12 ject to judicial review under section 706(a)(2)(A).

13 “(d) Nothing in this section shall be construed to
14 limit judicial review of an agency’s consideration of costs
15 or benefits as a mandatory or discretionary factor under
16 the statute authorizing the rule or any other applicable
17 statute.”.

18 **SEC. 7. SCOPE OF REVIEW.**

19 Section 706 of title 5, United States Code is amend-
20 ed—

21 (1) by striking “To the extent necessary” and
22 inserting “(a) To the extent necessary”;

23 (2) in paragraph (2)(A) of subsection (a) (as
24 redesignated by paragraph (1) of this section), by in-
25 serting after “in accordance with law” the following:

1 “(including the Information Quality Act as defined
2 under section 551(17))”; and

3 (3) by adding at the end the following:

4 “(b) The court shall not defer to the agency’s—

5 “(1) interpretation of an agency rule if the
6 agency did not comply with the procedures of section
7 553 or sections 556 and 557 to issue the interpreta-
8 tion;

9 “(2) determination of the costs and benefits or
10 other economic or risk assessment of the regulatory
11 action, if the agency failed to conform to guidelines
12 on such determinations and assessments established
13 by the Administrator of the Office of Information
14 and Regulatory Affairs under section 553(k); or

15 “(3) determinations under interlocutory review
16 under sections 553(g)(2)(C) and 704(2).

17 “(c) The court shall review agency denials of petitions
18 under section 553(e)(6) or any other petition for a hearing
19 under sections 556 and 557 for abuse of agency discre-
20 tion.”.

21 **SEC. 8. ADDED DEFINITION.**

22 Section 701(b) of title 5, United States Code, is
23 amended—

24 (1) in paragraph (1), by striking “and”;

1 (2) in paragraph (2), by striking the period at
2 the end, and inserting “; and”; and

3 (3) by adding at the end the following:

4 “(3) ‘substantial evidence’ means such relevant
5 evidence as a reasonable mind might accept as ade-
6 quate to support a conclusion in light of the record
7 considered as a whole, taking into account whatever
8 in the record fairly detracts from the weight of the
9 evidence relied upon by the agency to support its de-
10 cision.”.

11 **SEC. 9. EFFECTIVE DATE.**

12 The amendments made by this Act to—

13 (1) sections 553, 556, and 704 of title 5,
14 United States Code;

15 (2) subsection (b) of section 701 of that title;

16 (3) paragraphs (4) and (5) of section 706(b) of
17 that title; and

18 (4) subsection (c) of section 706 of that title;

19 shall not apply to any rule makings pending or completed
20 on the date of enactment of this Act.

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